Supreme Court, U. S.
FILED
NOV 12 1976
MICHAEL RODAK, JR., CLERK

No. 75-1583

In the Supreme Court of the United States

OCTOBER TERM, 1976

FRANCES MORRIS, ET AL., APPELLANTS

v.

L. MARION GRESSETTE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,

J. STANLEY POTTINGER,
Assistant Attorney General,

BRIAN K. LANDSBERG,
JOHN C. HOYLE,
JESSICA DUNSAY SILVER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Questions presented	1
Statement	2
A. The reapportionment litigation	2
B. The suit to compel the Attorney General to exercise his discretion	5
C. The three judge court decision in this case	7
The question is substantial	8
Conclusion	20

CITATIONS

Cases:

Abbott Laboratories v. *Gardner*, 387 U.S. 136	16
Allen v. *State Board of Elections*, 393 U.S. 544	13, 14
Connor v. *Waller*, 421 U.S. 656	8, 9, 10, 20
Dunlop v. *Bachowski*, 421 U.S. 560	9, 15, 16, 20
East Carroll Parish School Board v. *Marshall*, 424 U.S. 636	10, 20
Ewing v. *Mytinger & Casselberry*, 339 U.S. 594	14
Georgia v. *United States*, 411 U.S. 526	12, 13, 16, 18
Harper v. *Kleindienst*, 362 F. Supp. 742, affirmed *sub nom. Harper* v. *Levi*, 520 F. 2d 53	*passim*
Interstate Commerce Commission v. *Atlantic Coast Line R. Co.*, 383 U.S. 576	18
Perkins v. *Matthews*, 400 U.S. 379	16

Cases—Continued Page

South Carolina v. *Katzenbach*, 383 U.S. 301 ..... 2, 12, 13, 19
Twiggs v. *West*, D.S.C. Civ. No. 71-1106, decided April 7, 1972 ..... 3, 5, 6, 7, 8, 9, 10
United States v. *United Mine Workers of America*, 330 U.S. 258 19

Constitution and statutes:

United States Constitution:

Fourteenth Amendment 3, 8, 9
Fifteenth Amendment ..... *passim*

Administrative Procedure Act, 5 U.S.C. 701 *et seq.*:

5 U.S.C. 701-706 11
5 U.S.C. 702 ..... 7, 11
5 U.S.C. 704 16
5 U.S.C. 706(1) 15, 17

Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 520, 29 U.S.C. 402(b) 15
Voting Rights Act of 1965, Section 5, 79 Stat. 439, as amended, 42 U.S.C. 1973c ..... *passim*
28 U.S.C. 1361 ..... 15, 17
South Carolina Act 932, 1971 Sess. 2-3
South Carolina Act 1204, 1972 Sess. 4, 5
South Carolina Act 1205, 1972 Sess. ..... *passim*

Miscellaneous:

Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., Pt. 1 (1965) 17

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1583

FRANCES MORRIS, ET AL., APPELLANTS

v.

L. MARION GRESSETTE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to this Court's order of June 21, 1976, inviting the Solicitor General to submit a brief expressing the views of the United States. The United States suggests that the Court note probable jurisdiction.

QUESTION PRESENTED

The United States will discuss the following question:

Whether the Attorney General's objection to South Carolina's reapportionment of its Senate in Act 1205,

interposed after the Attorney General's earlier determination not to object had been invalidated on judicial review, prevents Act 1205 from becoming effective under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

STATEMENT

Under Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U.S.C. 1973c, no change in the voting laws or practices of covered jurisdictions that alters such laws or practices in effect on November 1, 1964, may be enforced unless and until the change is declared, in a suit brought by the covered jurisdiction against the United States before a three-judge district court in the District of Columbia, to be without discriminatory purpose or effect. Such a proceeding becomes unnecessary, however, if the change has been submitted to the Attorney General, and "[h]e has not interposed an objection within sixty days after such submission * * *" or has sooner indicated that he does not object. *Ibid.*

The State of South Carolina is a covered jurisdiction. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 318. This case involves legislation (Act 1205) reapportioning the South Carolina Senate.

A. The Reapportionment Litigation

The events leading to the Attorney General's objection to Act 1205 began five years ago. On November 11, 1971, South Carolina enacted alternative reapportionment plans for the State Senate (Act

932). *Harper* v. *Levi*, 520 F. 2d 52, 57 (C.A.D.C.). Both plans provided for multi-member districts, required candidates to run for numbered posts, and required primary elections to be decided by a majority vote. *Id.* at 57-58. Private suits contending that Act 932 violated the Voting Rights Act and the Fourteenth and Fifteenth Amendments were filed and a three-judge court was convened to hear them. (*Twiggs* v. *West*, D.S.C. Civ. No. 71-1106, decided April 7, 1972). *Id.* at 58. While these actions were pending, South Carolina submitted Act 932 to the Attorney General for Section 5 clearance. *Ibid.* On March 6, 1972, the Attorney General objected to Act 932 because he was "unable to conclude * * * that the combination of multi-member districts, numbered posts, and a majority (run-off) requirement would not occasion an abridgement of minority voting rights in South Carolina." *Ibid.*

Approximately one month later, the three-judge court rejected the Fifteenth Amendment claim for lack of evidence that the reapportionment was racially motivated (J.S. App. 47a), declined to consider the Voting Rights Act challenge to Act 932 (J.S. App. 30a), but held that the Act violated the Fourteenth Amendment due to malapportionment. *Twiggs* v. *West*, *supra* (J.S. App. 26a-49a). The court then allowed South Carolina 30 days within which to enact an acceptable substitute reapportionment plan. *Harper* v. *Levi*, *supra*, 520 F. 2d at 58.

On May 6, 1972, the South Carolina General Assembly passed the legislation involved in this case—

Act 1205 (J.S. App. 52a-56a). Section 2 reapportioned the State's senatorial districts. It set forth two alternative apportionments, Plan A and Plan B, and provided that if Plan A did not "meet the constitutional guidelines as set forth by the Three Judge Federal Court in its order of April 7, 1972, then the Senate * * * shall be apportioned" under Plan B (J.S. App. 54a). This Act retained the provisions of Act 932 calling for multi-member districts, numbered posts, and a majority vote in primaries. *Id.* at 57-58. Section 3 of the Act also included a provision extending the numbered post requirement to existing multi-member districts in the State House. *Id.* at 58.

South Carolina's chief legal officer submitted Act 1205 to the Attorney General on May 12, 1972. Eleven days later, on May 23, 1972, the three-judge court held the Senate reapportionment constitutional (Mot. to Aff. 15a), and ordered Plan A into effect (*ibid.*). The court stated that it had considered a number of other plans and found no other plan to be a substantial improvement over Plan A.[1]

While the Attorney General was considering Act 1205, South Carolina, on May 30, 1972, submitted to the Attorney General additional legislation (Act 1204) which extended the numbered post requirement to "all multi-member elective districts" in South Carolina. *Harper* v. *Levi*, *supra*, 520 F. 2d at 58.

[1] In an order dated June 9, 1972, denying plaintiff's motion to vacate or amend its May 23 order, the court stated that it had acted to grant relief because the General Assembly had failed to adopt a plan.

On June 19, 1972, the Attorney General notified South Carolina that he had received the previously requested information concerning Act 1204, that the submission on Act 1204 was complete, and that the 60-day period for Section 5 review of that statute would begin on that date. 520 F. 2d 59.

On June 30, 1972, the Attorney General interposed an objection to Act 1204 and to the part of Act 1205 that required numbered posts for the State House. *Ibid.* He declined, however, to object to Section 2 of Act 1205, reapportioning the State Senate, because he felt "constrained to defer to the * * * determination of the three-judge District Court" in *Twiggs*. The Attorney General wrote: "It would in our view not be appropriate to read the Voting Rights Act as requiring or permitting the Attorney General to review a determination made by a United States District Court in the proper exercise of its statutory jurisdiction" (Mot. to Aff. 15a).

B. The Suit to Compel the Attorney General to Exercise His Discretion

On August 10, 1972, two black South Carolina citizens sued the Attorney General in the District Court for the District of Columbia claiming that he had failed to exercise his discretion in not objecting to the Senate reappointment in Act 1205, *Harper* v. *Levi*, *supra*, 520 F. 2d at 59. The next day, the single judge district court entered an order finding that the time within which the Attorney General could object to Act 1205 had not expired and extending the time within which he could interpose an ob-

jection until further order of the court, or a further decision of the Attorney General (Mot. to Aff. 19a-20a). On May 16, 1973, the single judge district court granted summary judgment for plaintiffs and ordered the Attorney General to make "a reasoned decision in accordance with his statutory responsibility." *Harper* v. *Kleindienst*, 362 F. Supp. 742 (D.D.C.), affirmed, 520 F. 2d 53 (C.A.D.C.). In response to the order, the Attorney General filed a memorandum stating that in his opinion the Senate reapportionment had a "clear and substantial racial effect in contravention of the Fifteenth Amendment and its protections under Section 5 of the Voting Rights Act," but, nevertheless, he felt constrained to defer to the *Twiggs* decision and he declined to enter an objection. *Harper* v. *Levi*, *supra*, 520 F. 2d at 59.

The district court, on July 19, 1973, issued a second order directing the Attorney General to "[consider] Act 1205 without regard to the decision of the [*Twiggs*] Three Judge District Court." *Ibid.* Thereafter, on July 20, 1973, the Attorney General interposed an objection *nunc pro tunc* to the Senate reapportionment because he was "unable to conclude that Act No. 1205 does not have the effect of abridging voting rights on account of race" (Mot. to Aff. 18a).

On appeal from the single-judge court's orders in *Harper*, a divided panel of the District of Columbia Circuit affirmed,[2] holding (520 F. 2d at 59-60) (footnotes omitted)—

[2] Judge MacKinnon, dissenting, reasoned that Section 5's provision permitting a submitted change to be enforced with-

> that the court had jurisdiction [under 5 U.S.C. 702] of appellees' action, that the Attorney General's decision not to object was reviewable under the circumstances of this case, and that Section 5 requires him to make an independent determination on the merits of the Section 5 issues.

C. The Three Judge Court Decision in This Case

After that decision became final, two other South Carolina voters filed the present suit, as a class action under Section 5, in the district court in South Carolina (Mot. to Aff. 3a). Plaintiffs sought to enjoin implementation of the Senate reapportionment plan contained in Act 1205 on the ground that it had not been cleared under Section 5 by the Attorney General, or by a declaratory judgment action in the District Court for the District of Columbia. A three-judge court convened under Section 5[3] unanimously dismissed the complaint (J.S. App. 1a-25a). It held that the doctrine of collateral estoppel did not preclude the court from considering South Carolina's contention that, notwithstanding *Harper* v. *Levi*, *supra*, the requirements of Section 5 were satisfied when the Attorney General failed to interpose an objection within sixty days after submission to him of the Senate reapportionment plan contained in Act

in sixty days if the Attorney General failed to object committed the matter of objection solely to agency discretion. It was therefore unreviewable. *Id.* at 73-74.

[3] Two of the judges, Haynsworth, Chief Cir. J., and Russell, Cir. J., had participated in *Twiggs* v. *West*, *supra*.

1205 (J.S. App. 5a). Second, it ruled that the original determination by the Attorney General under Section 5 to defer to the district court in *Twiggs* v. *West* and to decline to render an independent judgment was not judicially reviewable (J.S. App. 25a). Finally, it held that the failure of the Attorney General to interpose an objection within sixty days of the submission authorized the State of South Carolina to implement the Senate reapportionment plan contained in Act 1205 (J.S. App. 25a). Accordingly, the court denied the injunction and dismissed the complaint.

THE QUESTION IS SUBSTANTIAL

This case presents a direct conflict between the three-judge district court in South Carolina and the District of Columbia Circuit as to the availability of relief to compel the Attorney General to exercise independent review of changes in voting laws and practices subject to Section 5 of the Voting Rights Act.[4]

[4] The policy of deference reflected in the Attorney General's determination of June 30, 1972, in this case was based on the belief that a local district court seized of a reapportionment suit challenging voting law changes adopted after November 1, 1964, "unquestionably had jurisdiction to consider the issues presented to it under both the Fourteenth and Fifteenth Amendments" (Mot. to Aff. 15a). In 1975, however, this Court held, in such a suit, that new reapportionment legislation is not effective in a covered jurisdiction until clearance under Section 5 has been obtained from the District of Columbia court or the Attorney General. Therefore a local district court errs in considering the constitutionality of such legislation under the Fifteenth Amendment. *Connor* v. *Waller*, 421 U.S. 656. Under the rationale of *Waller*, the district court in *Twiggs* should not have considered the Fifteenth Amendment

The court below has concluded that the district court in the *Harper* litigation was without jurisdiction, and therefore could not invalidate the Attorney General's prior non-objection so that he could reconsider the matter *nunc pro tunc*. In consequence, according to the court below, the Attorney General's objection of July 20, 1973, was a nullity, and Act 1205 may be enforced unless and until invalidated in an independent suit under the Fourteenth or Fifteenth Amendment. While the Attorney General, in light of this Court's subsequent decision in *Connor* v. *Waller*, 421 U.S. 656, has determined that the policy of deferring to local district courts with respect to matters subject to Section 5 is erroneous and no longer pursues that policy, he is of course substantially concerned with enforcement of the Fifteenth Amendment,[5] and with whether and to what extent his determinations under Section 5 may be reviewed.[6]

issues, nor should the Attorney General have deferred to its decision. However, the question remains whether the *Harper* court had jurisdiction, on judicial review, to nullify his erroneous determination, so that he could reconsider the submission of May 12, 1972, *nunc pro tunc*. The government's appeal in *Harper* antedated this Court's decision in *Connor* v. *Waller*, *supra*, and *Dunlop* v. *Bachowski*, 421 U.S. 560 discussed *infra*, p. 15, which clarified the applicable law.

[5] The government has previously participated in various stages of this litigation. The United States participated as an *amicus curiae* in *Twiggs* v. *West*; the Attorney General was the defendant in *Harper*, and the United States submitted an *amicus curiae* brief supporting the plaintiffs in the court below.

[6] Although the parties proceeded in the court below on the theory that Section 5 applies to Act 1205, appellees, in a

1. The court below held that the Attorney General's action was not "adjudicatory," *i.e.*, it had no binding effect on anyone's legal rights (J.S. App. 14a-15a). Moreover, it reasoned, any party dissatisfied with the Attorney General's failure to object had an adequate remedy in court, because Section 5 expressly

---

post-judgment motion, filed after this Court's decision in *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636, argued that under the rule of that case Act 1205 might be a court-ordered plan outside the scope of Section 5. If Section 5 does not apply, there would be no reason to reach the question of the validity of the Attorney General's objection in this case because preclearance would not have been required.

The *Twiggs* court, in approving Act 1205, indicated that it had considered a number of other plans and found none to be a substantial improvement over Plan A. In an order dated June 9, 1972, the court stated that it had acted to grant relief because the General Assembly had failed to adopt a plan. See p. 4, n. 1, *supra*. Despite these indications that Act 1205 was adopted by the court as relief, we believe that the plan is not a court-ordered plan, within the meaning of *East Carroll*. Contrary to the situation in *East Carroll*, the South Carolina legislature "reapportioned itself on its own authority." *East Carroll*, *supra*, 424 U.S. at 638-639, n. 6. The ~~direct~~ district court did not direct the preparation of a plan, but, rather, gave the legislature 30 days to enact one. Although its enactment was in the alternative, and subject to court approval, in our view it is an enactment undertaken upon the initiative of the legislature and could "not be effective as [law] until and unless cleared pursuant to § 5." *Connor* v. *Waller*, 421 U.S. 656. The court's subsequent adoption of the plan does not change its nature and origin. *Ibid.*

We do, however, recognize that the distinction between court-ordered plans under *East Carroll* and non-court-ordered plans subject to Section 5 is not always clear. If this Court were to determine that Act 1205 is a court-ordered plan, the presumption against the use of multi-member districts would, of course, apply. *East Carroll*, *supra*, 424 U.S. at 639.

provides that "neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement [of the change in election procedures]" (J.S. App. 15a). Thus, in the court's view, no private voter can be "adversely affected" or suffer any injury in fact entitling him to seek judicial review under the Administrative Procedure Act, 5 U.S.C. 702. The court further concluded that the express language of Section 5, as well as its legislative history, demonstrated that determinations by the Attorney General under Section 5 are not reviewable. To allow such review, it said, would, through delay, defeat the purpose of that sixty day limit within which the Attorney General must object before a submitted change in voting procedures may become effective and would require the Attorney General to make explicit reviewable findings, in the absence of a statutory requirement that he do so (J.S. App. 20a-23a). The court also stated that such review would be inappropriate because it would be available to private parties, in the form of a suit before a single judge district court under 5 U.S.C. 702, but would not be equally available to the states covered by Section 5, since the states' sole remedy is by a declaratory judgment action in a three judge district court of the District of Columbia (J.S. App. 24a-25a).

2. The district court's analysis misapprehends both the limited nature under the Administrative Procedure Act, 5 U.S.C. 701-706, of a judicial remedy to compel the exercise of administrative discretion, and

the purpose and effect of Section 5 of the Voting Rights Act. In our view the district court should have enforced the objection which had been entered by the Attorney General *nunc pro tunc* after he independently exercised his discretion under the *Harper* court's decree.

The district court's conclusion that when the Attorney General defers to a court ruling instead of exercising independent discretion no rights are determined is incorrect. Section 5 created a new statutory interest, supplementary to, but separate from the rights enforceable in a Fifteenth Amendment suit. It was Congress' answer to "nearly a century of systematic resistance to the Fifteenth Amendment * * *". *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328. Congress therein directed the automatic suspension of all new election requirements in covered jurisdictions, including reapportionment (*Georgia* v. *United States*, 411 U.S. 526), subject to alternative procedures for administrative or judicial determinations that "continued suspension of the new rule is unnecessary to vindicate rights guaranteed by the Fifteenth Amendment." *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 335.

This suspension and clearance procedure has five legally significant effects upon the rights of voters in covered jurisdictions. First, it frees them from the requirement of complying with changed election laws or procedures until the changes are shown to have no racially discriminatory purpose or effect. Second, it interposes the federal government between the voter protected by the Fifteenth Amendment and the

covered jurisdiction. Third, it imposes on the jurisdiction, not the citizen, the burden of initiating clearance proceedings. Fourth, it transfers the venue of such proceedings to the District of Columbia. Fifth, it places the burden of proving the absence of discriminatory purpose or effect upon the covered jurisdiction.[7]

Congress adopted this "unusual and * * * severe procedure" (*Allen* v. *State Board of Elections*, 393 U.S. 544, 556) because it found that "existing remedies were inadequate" (*ibid.*) to assure vindication of Fifteenth Amendment rights in the face of persistent efforts in some States to defeat them. See *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 309. By these new statutory procedures, Congress intended "to make the guarantees of the Fifteenth Amendment finally a reality for all citizens." (*Allen*, *supra*, 393 U.S. at 556). The Attorney General's role in passing upon Section 5 submissions is essential to the achievement of this purpose. Thus, his determination to defer to a district court has a substantial effect on the rights of voters protected by that Section.

The immediate consequence of the Attorney General's failure to object is to lift the automatic suspension and eliminate the need for clearance. Thereafter all citizens of a covered jurisdiction must ad-

---

[7] While the statute did not specify that in submissions to the Attorney General the burden of proof is on the jurisdiction, the Attorney General adopted this standard in regulations approved by this Court in *Georgia* v. *United States*, 411 U.S. 526, 531-539.

here to the new voting requirements. If those requirements perpetuate racial discrimination, the sole remedy for vindication of Fifteenth Amendment rights is a private suit in which the citizen must carry the burden of proving racially discriminatory purpose or effect. This is, however, the very remedy that Congress found to be inadequate, and that it sought to supplement by the suspension and preclearance provisions of Section 5. That Section's five effects (*supra*, p. 12) provide the requisite support for private actions to enjoin the implementation of voting changes by covered jurisdictions in the absence of the required clearance under Section 5. *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 556-557. Since these privately enforceable statutory rights may be lost forever when the Attorney General fails to object, it is incorrect to reason, as did the district court, that no legal rights are determined when the Attorney General announces his determination to defer, rather than to exercise his judgment on the merits.[8]

On the contrary, such a refusal entails substantial legal consequences, since it removes the barrier to enforcement of the state law imposed by Section 5.

---

[8] For these reasons, the district court's reliance on *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594, is misplaced. The Court there held unreviewable an agency's determination of probable cause to refer a drug company's case to the Attorney General for the institution of seizure proceedings because its only consequence was to subject the company to possible suit. As we have shown above, the determination here has immediate effects on the voting rights of citizens.

It has the practical effect of eliminating the protections of Section 5 and of authorizing a change in the state's voting laws. Accordingly, we now believe, in light of decisions of this Court rendered subsequent to our appeal in *Harper* (see n. 4, *supra*), that judicial relief to compel the Attorney General to exercise his discretion, to the limited extent exercised in *Harper*, is authorized by law. 28 U.S.C. 1361 (district courts have jurisdiction of suit to compel performance of official duty); 5 U.S.C. 706(1) (reviewing court may compel agency action unlawfully withheld).

In holding that such limited judicial relief (obtained here in *Harper*) is a nullity to be disregarded, the decision below is inconsistent with *Dunlop* v. *Bachowski*, 421 U.S. 560. This Court there held that the Administrative Procedure Act authorizes judicial review, for limited purposes, of a decision of the Secretary of Labor not to bring a civil action to set aside a union election under the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 73 Stat. 520, 29 U.S.C. 402(b). The court below purported to distinguish *Bachowski* on the ground that suit by the Secretary was the exclusive remedy for irregularities in a union election, and plaintiffs there thus had no adequate remedy at law. The same is true, we submit, with respect to Section 5, since a determination by the Attorney General to defer to the district court ruling and not to decide independently whether to object under Section 5 leaves a state's voters without the protections of that statute.

His non-objection based on such a determination affects the statutory rights of the state's electorate under the Voting Rights Act at least as much as the Secretary's decision not to challenge a union election affects the rights of the union electorate under the LMRDA.

Indeed, the holding below that a voter suit under the Fifteenth Amendment is an adequate remedy at law not only is contrary to the congressional finding that such relief is inadequate (see, *supra*, p. 13), it also misconstrues the language of 5 U.S.C. 704, which defines the kinds of administrative actions subject to judicial review. That section expressly provides for judicial review of "final *agency* action for which there is no other adequate remedy in a court * * *" (emphasis added). A private suit challenging a state voting law under the Fifteenth Amendment does not involve review of "agency" (the Attorney General's) action under Section 5.

Although the language and history of Section 5 demonstrate that the Attorney General's determination is to be made swiftly (*Georgia* v. *United States*, *supra*, 411 U.S. at 539) and independently (*Perkins* v. *Matthews*, 400 U.S. 379, 385), they do not support the district court's conclusion that Congress foreclosed the kind of limited judicial relief exercised in *Harper*. The language of Section 5 must be read in light of the presumption of reviewability contained in the Administrative Procedure Act. *Dunlop* v. *Bachowski*, *supra*, 421 U.S. at 567; *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140. Considering this presumption, we believe that an area of judicial review, no broader than that exercised in *Harper*, is in accord with the legislative scheme of the Voting Rights Act, as well as 5 U.S.C. 706(1) and 28 U.S.C. 1361.

The legislative history of the 1965 Act is not to the contrary. The provision for clearance by the Attorney General within a fixed period was suggested by then Attorney General Katzenbach in response to concerns that plainly lawful state legislation would be unduly delayed pending a declaratory judgment action in the District Court for the District of Columbia. The Attorney General suggested that the declaratory judgment action could be limited "to those laws which the Attorney General takes exception to within a given period of time." Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., Pt. 1, 237 (1965). He did not suggest that judicial review was to be totally foreclosed, nor did anyone else.

The sixty-day limit contained in Section 5 is not evidence that Congress intended to foreclose limited judicial review. The sixty-day limit assures expeditious clearance by the Attorney General of changes in state law which obviously raise no problems under the Fifteenth Amendment. By establishing this convenience for covered jurisdictions, Congress did not intend to preclude judicial review to determine whether the decision of the Attorney General to defer to a district court's Fifteenth Amendment ruling rather than to exercise his discretion was in accord with the requirements of the Voting Rights Act. Con-

gress could safely presume that such relief was available under the Administrative Procedure Act (see discussion, *supra*). "Any less stringent standard might well have rendered the formal declaratory judgment procedure a dead letter by making available to covered States a far smoother path to clearance." *Georgia* v. *United States*, *supra*, 411 U.S. at 538. Thus the sixty-day limit is not conclusive of the rights of the citizens protected by Section 5. The right to an independent exercise of discretion by the Attorney General before the protections of Section 5 are lifted is enforceable by the judiciary in proceedings for judicial review, for the same reasons that the rights of a union electorate are enforceable by a limited (although somewhat broader) review of the Secretary of Labor's decision not to challenge a union election.

Nor is there any unfairness in affording this limited judicial review to voters even though covered jurisdictions cannot obtain review of the Attorney General's determination and are instead confined to the declaratory judgment proceeding in the District of Columbia. Perfect symmetry in judicial review proceedings is not required, so long as the substantial rights of all parties may be asserted in a judicial forum. See e.g., *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.*, 383 U.S. 576 (rail carrier may obtain review of administrative reparations order only in defense of enforcement action by shipper). The *de novo* suit provided for in the District of Columbia is a full and complete remedy for cov-

ered jurisdictions.[9] *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 332.[10]

The court below emphasized the congressional purpose to allow the Attorney General freely to exercise his discretion regarding compliance with the substantive requirements of Section 5. (J.S. App. 22a-23a). However, the *Harper* ruling supports that purpose, by requiring the Attorney General to exercise his discretion. We believe that a proper reading of the limited judicial review undertaken by the *Harper* court—review in the nature of mandamus of the Attorney General's failure to exercise his discretion on the basis of a stated policy [11] found by the *Harper*

---

[9] Although not an indispensable party (*Harper* v. *Kleindienst*, *supra*, 362 F. Supp. at 744), a covered jurisdiction, of course, may intervene in any suit challenging the Attorney General's failure to object and defend its interest. Appellees did not do so here.

[10] Appellants also contend (J.S. 14-15) that this Court need not determine whether the decision in *Harper* is correct because the single-judge district court in that case issued an interlocutory order declaring that the Attorney General's time to object had not expired, and would be extended until he acted or until further order of the court. See Statement, *supra*, pp. 5-6. Under *United States* v. *United Mine Workers*, 330 U.S. 258, the argument continues, this order was intended to preserve the status quo pending the court's determination of its jurisdiction, and therefore was clearly within the inherent powers of the district court. This aspect of *Mine Workers*, however, involved the power of the district court to impose contempt sanctions upon a party for disobeying an order directed to it. In this case South Carolina was not a party to the *Harper* litigation and was not under a court order restraining enforcement of Act 1205. *Mine Workers* therefore has no application here.

[11] See *supra*, p. 8, footnote 4.

court to be contrary to the procedural requirements of the Voting Rights Act—will not interfere with the substantive determinations committed by Section 5 to the discretion of the Attorney General.

In sum, we submit that, in light of *Connor* v. *Waller*, *supra*, and *Dunlop* v. *Bachowski*, *supra*, the decision in *Harper* v. *Levi* was correct, and that the district court erred in refusing to defer to it. In the alternative, if the Court considers Act 1205 to embody a court-ordered plan within the meaning of *East Carroll Parish* v. *Marshall*, 424 U.S. 636, then the district court abused its discretion by authorizing multi-member districts. See n. 6, p. 10, *supra*.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

J. STANLEY POTTINGER,
Assistant Attorney General.

BRIAN K. LANDSBERG,
JOHN C. HOYLE,
JESSICA DUNSAY SILVER,
Attorneys.

NOVEMBER 1976.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 223680 15